THE

Madras Weekly Notes.

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THE CASE IN [1911] 2 M. W. N. 227.

The decision reported in [1911] 2 M. W. N. 227, is one of far reaching importance and deserves a detailed notice. Though the actual decision is unexceptionable, we cannot help expressing our dissatisfaction with the ratio of it. The point for their Lordships' determination is, whether a Vendor can recover from the Vendee a sum of money which the latter was directed to pay to the Vendor's creditors but which he failed so to pay within a reasonable time and the Vendor himself has not paid. Their Lordships held in favour of the Vendor's right to recover the amount and we need hardly add that it is entirely in consonance with natural justice and equity. It is but fair that the Vendor should be allowed to get back the amount which the Vendee agreed but failed to pay to his creditors. But the question is, what is the nature of that right? Their Lordships clearly say that the Vendor cannot rely on his lien for the simple reason that it must be taken to have been lost by the Vendee's agreement to pay it to his creditors. They also say that if the purchaser enters into direct relations with the creditor and renders himself liable to make the payment, the assignor cannot require him to pay the consideration to himself. In case he does not do so, the Vendor is held entitled to recover. Their Lordships observe :—"But these instances do not affect the *general nature of the right* possessed by the Vendor * *." It is by no means clear what their Lordships mean by the *general nature* of the right. All the previous cases to which reference is made in this Judgment, treat the question as one of damages for breach of covenant to pay. In 23 Mad. 441, with which their Lordships express their concurrence, Subhramania Iyer and Moore, JJ. say that "there was a breach for which the plaintiff is entitled to recover damages" and go on to cite English authorities to show that in such a case the measure of damages to which the plaintiff is entitled is the sum payable by the purchaser to the Vendor's creditor. Similarly *In the case of Abdulla Beary* [1910] 7. M. L. T. 376, *Sir Arnold White, C. J.* and *Krishnaswami Iyer J.* laid down that "a promise to pay to a stranger is a mere covenant, the breach of which must be compensated in damages." Their Lordships in the present case seem to concede that position, for it is said in one place that "he (the Vendor) could not claim any *further* damages which he had not actully sustained." This was all that was decided in 14 M. L. J. 285, though, as Mr. Justice Miller pointed out in 8 M. L.T. 188, it suggests that the plaintiff had no cause of action without proof of damage sustained at the date of suit. Similarly in 16 M. L. J. p. 20, the Vendor claimed something more than the amount which the purchaser undertook but failed to pay to the Vendor's creditor. Moore & Sankaran Nair, JJ.

negatived that claim on the ground that the Vendor had not sustained any actual damage but at the same time held that the purchaser was bound to return to the Vendor the actual amount which was retained by him for payment. Therefore there is no real conflict between the cases in 14 M. L. J. and 16 M. L. J. on the one hand and 23 Mad. on the other. The following propositions may be taken to have been laid down by the above cases :—

1. In a case of this kind the Vendor is entitled to get back the actual amount retained by the purchaser for paying the creditor.

2. He is not entitled to any further damages unless he proves actual damage.

3. Even in the first case, the Vendor can recover the amount only as *damages* for breach of covenant to pay.

In this state of authorities came the decision in 36 Ind. App. 203, where the Privy Council held that a purchaser of mortgaged property, subject to incumbrances, which proved in the end valueless, was not bound to pay the mortgagor the value of such incumbrances. No doubt it was a case of indemnity and the mortgagor cannot complain if the equity of redemption sold to the purchaser turned out to be more valuable than it was at the date of the sale. But in the course of the Judgment their Lordships observed :—"If the purchaser covenants with the Vendor to pay the incumbrances, it is still nothing more than a contract of indemnity." In the face of this observation it would be difficult to maintain that the reasoning of Subhramania Iyer and Moore, JJ. was correct. That is the reason, we take it, why the learned Judges in the present case contented themselves with expressing their agreement with the actual decision but did not adopt their reasoning. The result is, that the Vendor's right is no doubt upheld but it is not clear on what legal basis it is placed. It is not certainly the Vendor's lein because it was held to be destroyed; 7 M. L. T. 376. The suggestion that the purchaser may be treated as an agent of the Vendor for the purpose of paying his creditor was rejected in 21 M. L. J. 359 and it is said that there is a "clear legal distinction, though a fine one, between a Vendee owing money to the Vendor being directed to pay it to a stranger (as here) and a person being entrusted with another's money to be paid to a stanger." Again it cannot be awarded as damages for breach of contract as the Privy Council seem to think that there is no difference between such a contract and one of indemnity. It is therefore difficult to discover the legal basis of the right accorded to the Vendor. In these circumstances we very much wish that the learned Judges had referred the matter to a Full Bench, though not for the reason assigned by the learned Pleader for the Respondents.

SYNOPSIS OF CASE LAW

Rose v. *Spicer*, *Rose* v. *Hyman* (1911) 2 K. B. 234. (*C. A.*)

A piece of ground and the Chapel thereon were demised for a term of 99 years from 1842 and the lease contained covenants by the lessees to repair, maintain, and keep the Chapel in substantial repair. The Chapel was used as a place of religious worship for 60 years. The lease was then sold and the purchasers adapted the premises for a theatre by making structural alterations. Then the reversioner commenced this action for

possesssion and the only question was, whether defendant-lessess were entitled to relief from forfeiture.—

Held, (*Buckely, L. J.* dissenting) that the alterations were breaches of the covenant to repair and were acts of waste which the Court would restrain by injunction, and the relief ought not to be granted except on the terms of the reinstatement of the premises in their former condition.

Per *Fletcher Moulton, L. J.* :—" One thing appears to me to be axiomatic namely, that the Court will not grant relief to a lessee who persists in a continuing breach and who informs the Court that it is his intention so to persist. "

The principles on which relief against forfeiture will be granted are discussed at great length.

Ranson v. *Platt*, (1911) 2 K. B. 291.

It is the duty of a bailee to take care of the goods bailed to him ; and if a hostile claim is made to them by a third party, it undoubtedly is *prima facie* the duty of the bailee to see that the bailor's property is properly defended, or at any rate to give notice to him, if possible, of proceedings hostile to his title. Where the bailee does not give such notice of hostile claim to the bailor, he is clearly guilty of breach of duty and will beliable to an action for damages for negligence.

West Yorkshire Darracq Agency (*Limited*) (in liquidation) v. *Coleridge*, (1911) 2 K. B. 326.

Held, an agreement between creditors mutually to forego the debts owing to them is binding upon them in the sense that it can be enforced against them by the debtor who has done nothing more than be a party to the agreement.

Hirachand Panamchand v. *Temple*, (1911) 2 K. B. 330. (C. A.)

Where the father of a debtor wrote to the creditor, offering an amount less than that of the debt in full settlement of the same, and enclosing a draft for that amount, and the creditor cashed and retained the proceeds of the draft, and afterwards brought an action against the debtor for the balance of the debt :—

Held, that the creditor must be taken to have accepted the amount received by him on the terms upon which it was offered, and therefore, he could not maintain the action.

Dagdu v. *Nana*, 35 *B*. 93.

Where an ostensible sale-deed was sought to be set aside by proof of a contemporaneous representation or agreement to the effect that it was not to operate as a sale-deed, held that no evidence of such an agreement or representation was admissible under sec. 92, Indian Evidence Act.

Taluqdari Settlement officer v. *Dwarakadas*, 35 *B*. 97.

Where *wanta* lands (rent-free lands held by Rajputs and originally granted by Indian rulers for keeping order) the income of which is attached in execution has been declared alienated under the Land Revenue Code, Bombay (Act V of 1899), held that the Courts may presume that it is not Taluqdari tenure.

Held also that the expression "Taluqdari estate" in sec. 31 of Bombay Act VI of 1888 (Guzarat Taluqdar's Act) is used in a technical sense.

THE WEEK'S CASES.

9th October, 1911.

Sir Arnold White, C. J., Sankaran Nair, J. and Ayling, J.

Special Bench Case 1 of 1911.

Held a statement to a Police Inspector by a person who was subsequently taken as an approver in the case, is not inadmissible in evidence under S. 25 of the Evidence Act, as a confession made to a Police officer. It is admissible under S. 157 of the I. E. Act for the purpose of corroborating the approver's evidence.

Abdur Rahim, J. and Spencer, J.

C. M. A. 45 of 1910.

There is nothing in the Guardian and Wards Act to show that the procedings under the Act are of a summary character. When the Judge dismissed the petition filed under the Act for the appointment of a guardian of the properties of a minor observing that the petitioner should first have declared in a regular suit that certain alienations and mortgages created by the natural guardian of the minor are not binding on him before putting in a petition under the Guardian and Wardsr Act, the High Court held that his order was not justifiable and that he must make proper enquiries on the petition and pass orders on the merits.

10th October, 1911.

Abdur Rahim, J. and Spencer, J.

C. M. S. A. 37 of 1910.

A redemption decree was passed against defendants 1 to 5 the mortgagees and 6th defendant the sub-mortgagee. The first Court disallowed costs and mesne profits to the mortgagors. On appeal the Distirct Court allowed mesne profits and costs against defendants 1 to 5. The decree directed that 'out of the deposit the 6th defendant's dues be paid first.' The 6th defendant before the disposal of the appeal by the District Court applied and drew money due to him out of the deposit. The mortgagors then applied to recover the amount of mesne profits and costs from the 6th defendant in restitution: held that the priority given by the decree to the 6th defendant is meant to avail only as against defendants 1 to 5 and not against the mortgagors and that the mortgagors were entitled to recover.

11th October, 1911.

Abdur Rahim, J. and Spencer, J.

C. M. S. A. 74 of 1910.

No appeal lies from an order granting enlargement of time for paying money in a decree for redemption brought by the mortgagee even though the order be illegal and *ultra vires.*

Sundara Iyer, J. and Phillips J.

S. A. 574 of 1909.

Registration is not necessary to bring a landholder within the wording of Sec. 3 of the Estates Land Act.

When a relationship between two parties has been settled by litigation other people cannot contend that one of them has not the right against the other.

S. A. 1151 of 1909

A procession of Chakrathalwar used to pass through a particular street during the festival of Bramothsavam in a particular temple to accept gifts from the weavers of a neighbouring village who used to present cloths etc., when the said Chakrathalwar was taken to a place where they

lodged for the said purpose. Owing to disputes between the weavers and the Dharmakarthas of the temple the weavers stopped making presents and the procession of Chakrathalwar was stopped by the temple authorities also. The plaintiff one of the residents of the street through which the procession used to pass instituted a suit against the Dharmakarthas for the damages caused to him on account of the procession not passing his house and, for a declaration that the temple authorities should be directed to take the said idol in procession in future years.

Held that the fact that the plaintiff used to worship the God from his house when the God passed in procession to the weavers' quarters would not give the plaintiff a *right* to worship in front of the house and that the suit for the declaration and for damages should be dismissed. Remarks on the nature of evidence required to prove a right to worship in a particular place and to have the procession conducted through a particular route discussed.

12th October, 1911.

Sundara Iyer, J. and Phillips, J.

C. R. A. 194 of 1911.

Sundarier, J :—Where in a prosecution for defamation, against the printer and publisher of a newspaper, the prosecutor failed to prove printing and publication by the accused, held (1) that the statement of the accused should not be used to fill up gaps in the prosecution case, (2) that the presumption under Sec. 81 of the Indian Evidence Act, as to the genuineness of newspapers does not extend to the fact of the accused having published it, and (3) that this is not a case for ordering retrial under Secs. 423 and 428.

Phillips, J :—Agreeing with Sundarier, J. on the merits, held that this was a proper case for retrial as the omission to prove publication was entirely due to the oversight of the court.

13th October, 1911.

Sundara Aiyer, J. and Phillips, J.

S. A. 820 of 1910.

A suit for recovery of rent is one of a small cause nature. The fact that it was brought and tried as a regular suit and that a question of title had to be decided incidentally is immaterial.

S. A. 978 of 1910.

Where the plaintiff brings a suit on a mortgage but that mortgage is denied by the defendant who sets up a different mortgage to the plaintiff and another person who is not a party to the present suit, no decree can be passed on the mortgage admitted by the defendant.

REVIEW.

Evidence and Practice at trials in Civil cases by R. E. Kingsford, M. A., LL. B. Publishers: The Carswell Company, Limited, Toronto: This book, we have no doubt must be invaluable to all lawyers. In Part I, the general principles of Evidence are all set out. Part II treats of evidence in particular cases ; this is divided into Actions on simple contracts, actions independent of contract and actions on specialities and the various actions that can be brought in a Court of Law are dealt with under one or other of these heads. The book points out what issues arise in each case and what evidence would go to prove such issues.

Part III deals with the defences that are available to the various actions. The book is written in a masterly fashion and is indispensable to every lawyer.

The Mahomedan Law of Inheritance by S. N. Subbarama Sastri. Publishers: Higginbotham & Co., Madras.

The present work is a digest of the Law of Inheritance according to the Sunni and Shiah sects and of the Anglo Indian statute Law and the case law on the subject and contains also a chapter on partition. The subject has been very clearly dealt with by the author and the book is bound to be of immense use to the law students. It will surely serve as a good book of reference to a busy lawyer.

The Analysis of Salmond's Jurisprudence by R. E. De Beer. Publishers: Stevens & Haynes, London.

The author's aim in bringing out this work is to assist the students preparing for examination. The analysis has been ably prepared and preserves all that is essential to be remembered from Mr. Salmond's Jurisprudence without unduly burdening the memory.

Office Procedure and Business Correspondence and *Methods and Machinery of Business by H. Clemson. Publishers: Butterworth & Co., London and Calcutta*:—We have pleasure in acknowledging receipt of these books which we have, no doubt, will be useful to bankers and business men.